No. 6447

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GWYNETH HELBUSH,
Appellant,

vs.

HERMAN H. HELBUSH,
Appellee.

BRIEF FOR APPELLANT.

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FOREWORD.

This is an appeal by Gwyneth Helbush from a judgment of the United States District Court for the Southern District of California, Central Division, dismissing a bill of complaint brought by appellant against Herman H. Helbush, appellee, for the purpose of having a final decree of divorce, granted by the Superior Court of the State of California, vacated and set aside upon the ground that the same was entered against appellant in violation of certain constitutional rights.

STATEMENT OF THE CASE.

Appellant was granted an interlocutory decree of divorce against appellee in June, 1924, by the Su-

perior Court of the State of California, in and for the City and County of San Francisco. In August, 1924, the parties resumed marital relations and appellant condoned the offense of appellee upon which the interlocutory decree had been granted. The parties lived together until January, 1929, when appelle deserted appellant. On April 10, 1929, upon *ex parte* application of appellee a final decree of divorce was entered in the action brought in 1924, appellee at that time disclosing to the Court by the oral statement of his attorneys that the parties had been living together as man and wife from August, 1924, to January, 1929. Appellant upon hearing of said action immediately moved for the vacation of said decree upon the ground that said decree had been entered without any notice to her to which notice she was entitled because of the condonation and resumption of marital relations between the parties and that said Court was without jurisdiction to enter said decree. The motion was heard and denied and an appeal from said ruling was affirmed by the California Supreme Court on July 15, 1930. (*Helbush v. Helbush,* 209 Cal. 758.)

APPELLANT'S CONTENTIONS.

Appellant has made certain assignments of error on the part of the trial Court. Briefly stated, her contentions are that she has not had her day in Court in that she was deprived of notice and a right to be heard before the final decree of divorce was entered against her and that she has been deprived of her property and her status as wife without due process

of law, in that certain community property interests acquired by the parties during the period from 1924 to 1929, were, by the entry of the final decree of divorce, terminated adversely to her.

These contentions are based on the ground that the California Courts ignored the provisions of the California Civil Code, Sections 131 and 132, stating that the marital bonds are not severed by an interlocutory decree of divorce, and Section 111 of said Code stating that in the event of condonation, no divorce shall be granted and acting under Section 132 of said Code, entered a final decree of divorce *ex parte,* holding that said section authorizes the *ex parte* entry of a final decree of divorce after condonation, a ruling which, it is submitted, is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States and voids any judgment entered under such procedure.

ARGUMENT.

A. THE UNITED STATES DISTRICT COURT HAS JURISDICTION OF THIS SUIT.

The United States District Court has competent jurisdiction in equity to vacate and set aside an *ex parte* judgment of a state Court, void for want of authority to render it, either because prohibited by statute (Cal. Civil Code, Sec. 111) or in violation of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States, especially if based upon a statute such as Section 132 of the Civil Code of California, construed by the state

Courts to authorize the *ex parte* judgment. The federal question presented gives the United States District Court the requisite jurisdiction, the value of the matter in controversy exceeding the sum of three thousand dollars.

U. S. Code, Title 28, Sec. 41;
Judicial Code, Sec. 24;
Simon v. Southern Railway, 236 U. S. 115, 122, 125, 126, 127, 132;
Ex parte Young, 209 U. S. 123.

B. DECREE OF DIVORCE VOID FOR WANT OF JURISDICTION.

The final decree of divorce is void for want of jurisdiction.

1. In the first place it is expressly prohibited by Section 111 of the Civil Code, there having been condonation by plaintiff of the extreme cruelty specified in the interlocutory decree. Proceedings in divorce are entirely statutory (9 *Cal. Jur.* 628) and therefore the statutory prohibition against divorce where there has been condonation is jurisdictional and a decree of divorce in violation of it is absolutely void. According to all the authorities on the point this is the well settled law.

Jones v. Jones, 59 Ore. 308, 312, 313;
Marsh v. Marsh, 13 N. J. Eq. 281, 286;
Byrne v. Byrne, 93 N. J. Eq. 5, 8, 9, 10;
19 *Corpus Juris* 87;
2 *Schouler on Mar. & Div.* (6th Ed.), Sec. 1690;
Long v. Superior Court, 102 Cal. 449, 452;
Windsor v. McVeigh, 93 U. S. 274, 282.

A decree that is void for want of jurisdiction is not due "process of law."

Scott v. McNeil, 154 U. S. 34, 46.

The affirmnance by the state Supreme Court of a void decree is itself null and void.

Ball v. Tolman, 135 Cal. 375, 380;

Pioneer Land Co. v. Maddux, 109 Cal. 633, 642.

It is also held by the authorities last cited that the Supreme Court's affirmance on the appeal cannot impart the slightest validity to the void decree.

2. The final decree of divorce having been given and made *ex parte,* without affording the plaintiff an opportunity to be heard against it, is in violation of her constitutional right to "due process of law," as conferred upon her by the Fourteenth Amendment of the Constitution of the United States.

Simon v. Craft, 182 U. S. 427, 436, 437;

Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 236;

5 *Cal. Jur.* 875, 876;

10 *Am. & Eng. Ency. Law.,* 296, 300.

The plaintiff had a perfectly good defense against the final decree, by reason of the condonation nullifying the interlocutory decree and therefore *she had the constitutional right to a hearing before the final decree was made.* As she was not accorded this constitutional right, the decree is void. The law is so stated by the authorities last cited. The interlocutory decree, though an essential prerequisite to the validity of the final decree, is not a decree of divorce (9 *Cal. Jur.* 757, 758) and therefore, the paramount impor-

tance of the final decree in terminating the marriage by dissolution. Necessarily such a decree is in violation of constitutional right if *ex parte* in a case where there exists a perfectly valid defense to it, for instance, condonation since the interlocutory decree, the statute (Civil Code Sec. 111) expressly prohibiting a final decree of divorce in such cases.

3. And the Supreme Court having construed Section 132 of the Civil Code as sustaining the *ex parte* final decree, the statute is void because in conflict with the "due process of law" clause in the Fourteenth Amendment of the Constitution of the United States, in depriving the plaintiff of an opportunity to be heard against it prior to its rendition.

Simon v. Craft, 182 U. S. 427, 436, 437;
5 *Cal. Jur.* 875, 876;
10 *Am. & Eng. Ency. Law,* 296, 300.

And the United States District Court will set aside and vacate the *ex parte* final decree and issue an injunction against it; also against the party claiming under it.

Simon v. Southern Railway, 236 U. S. 115, 122, 125, 126, 127, 132;
Ex parte Young, 209 U. S. 123.

C. A COURT OF EQUITY HAS JURISDICTION TO ANNUL AND SET ASIDE A VOID JUDGMENT.

It is the well settled law that a Court of Equity has competent jurisdiction to annul and set aside a void judgment.

5 *Pomeroy's Eq. Jur.* (4th ed.) Secs. 2084, 2085, 2087, 2088;

3 *Freeman on Judg.* (5th ed.) Secs. 1182, 1198, 1201, 1227;
Simon v. Southern Railway, 236 U. S. 115;
Ex parte Young, 209 U. S. 123;
Jeffords v. Young, 98 Cal. App. 400, 407;
Bacon v. Bacon, 150 Cal. 477, 484, 485, 491;
Wilcke v. Duress, 144 Mich. 243.

Nor is the denial of a motion to set aside the void judgment, by the Court that rendered it, *res judicata* as against a subsequent bill in equity to vacate the judgment.

Lake v. Bonynge, 161 Cal. 120, 129, 131, 132;
Bacon v. Bacon, 150 Cal. 477, 484, 485, 491;
Estudillo v. Security Loan etc. Co., 149 Cal. 556, 563, 564, 565;
Herd v. Tuohy, 133 Cal. 55, 63;
3 *Freeman on Judg.* (5th ed.) Sec. 1198.

And in no case is a decision *res judicata* where the Court has refused to decide the question presented, the case here. A bill in equity to vacate a judgment is a direct attack upon it and being such the doctrine of *res judicata* can have no application.

15 *Cal. Jur.* 9.

D. CONCLUSION.

We submit that in view of the foregoing authorities, the appellant was deprived of her day in Court. That it is no answer that she was permitted to appeal to the Court to have the action already taken by that Court without notice to her, vacated and set aside and that it is of no moment how extensive a hearing

may have been had upon the proceeding to vacate and set aside the order already had. The violation of appellant's substantial rights occurred at the time the order was entered against her without notice and it is merely putting the cart before the horse to say that this violation can be remedied and cured by steps subsequently taken to vacate and set aside the void order.

In our opinion the judgment of the District Court should be reversed.

Dated, San Francisco,
September 28, 1931.

Respectfully submitted,
GEORGE CLARK,
HARRY I. STAFFORD,
Attorneys for Appellant.